

Daniel KC Tan & Associates Sdn Bhd v Progressive Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO P22-34 OF 1986
KAMALANATHAN RATNAM J
14 MARCH 2001

Contract — Termination — Notice of termination — No notice given to plaintiff — Principal agency agreement, Insurance — Whether notice required to be given when plaintiff had breached agreement by not paying premiums within the time stipulated

Contract — Termination — Validity — Principal agency agreement, Insurance — Defendant terminated agreement on ground that plaintiff did not pay premiums within time stipulated — Whether termination of agreement valid

Contract — Terms — Arbitration clause — Whether plaintiff estopped from invoking arbitration clause when plaintiff had opposed to defendant's earlier application to refer the matter to arbitration

Tort — Damages — Proof of damage — Whether plaintiff had proved its damage — Whether claim for future projected loss too remote and untenable

Tort — Defamation — Damages — Loss of business goodwill — Whether claim should be considered when plaintiff failed to plead for it

Tort — Defamation — Libel — Defences — Justification — Whether words in notice true — Whether defendant had a legal, moral and social duty to send out notices

Tort — Defamation — Libel — Meaning of words — Whether content of notice defamatory and was made in malice

Tort — Defamation — Libel — Plaintiff did not plead advertisements as libellous — Whether could rely on advertisements to find a case

The defendant is a local insurer and the plaintiff was at all material times in the business of insurance underwriting. By a principal agency agreement ('the agreement') dated 2 January 1981 between the plaintiff and the defendant, the plaintiff was appointed the defendant's principal agent and authorized to issue policies of all kinds which included motor and non-motor policies. By virtue of cl 7 of the agreement, the plaintiff was given 90 days to settle all money due to the defendant for non-motor policies and there was no credit period for motor insurance. By virtue of cl 14 of the agreement, either party was to give the other party three months' notice in the event it wished to terminate the agreement. Clause 21 of the agreement was an arbitration clause. The plaintiff had not remitted to the defendant the premiums collected and based on the plaintiff's auditors' documentation itself, the plaintiff had, as of 18 December 1986 owed the defendant the sum of RM1,050,100.25 as unpaid premiums. The

- A defendant sent out notices dated 10 November 1986 to the plaintiff's customers or policy holders or sub-agents stating that the agreement with the plaintiff had been terminated as of 30 September 1986. The plaintiff filed a claim against the defendant for breach of the clauses in the agreement. The defendant filed an application for a stay of proceedings pending reference to arbitration ('the said application')
- B but was dismissed with costs after the plaintiff had opposed the said application. The issues for determination were: (i) whether there was a three months' notice of termination given to the plaintiff pursuant to cl 14 of the agreement; (ii) when is a notice under cl 14 of the agreement required; (iii) whether there was a breach of cl 7 of the agreement by the plaintiff; (iv) whether the defendant was required to give the three months' notice of termination; (v) whether the defendant was in breach of cl 21 of the agreement, ie the arbitration clause; (vi) whether the defendant by sending out the notice of termination to all customers and policy holders and by placing such similar advertisement in the newspapers had defamed the plaintiff;
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- D (vii) whether the plaintiff could claim for loss of business goodwill when it failed to plead for this head of damage; and (viii) whether the plaintiff had proved its damage.

Held, dismissing the plaintiff's claim with costs:

- E (1) There was no notice of termination that was alleged to have been given, that had been shown to the court. In the absence of any such document the court must find that no such notice has been given. It is a question of fact for the court to find if such a notice of termination had indeed been given by the defendant and it was the court's finding that no such notice was indeed given
- F (see pp 651I–652C).
- G (2) The requirement of the notice pursuant to cl 14 became important only in cases of either party not wanting to continue with the agreement indefinitely. It was necessary for the court to consider the agreement as a whole rather than clause by clause in order to appreciate the reason why the requirement of the three months' notice was stipulated in cl 14. Other than what was stated in cl 14 there were no other reasons given as to when parties could terminate the agreement. Therefore it only stands to logic that the need to give a three-month notice by either party wanting to terminate the agreement was to enable them to regulate their accounts and related matters. Clause 14 therefore need not apply to an instance of a breach of cl 7 of the agreement by the plaintiff. Clause 14 should be read as if it contained the words 'except where there has been a breach of cl 7 of this agreement' (see pp 652D–F, 653C); *Howe v Botwood* [1913] 2 KB 387 followed.
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- I (3) As at 31 May 1986 the plaintiff had owed the defendant a sum of RM1,050,100.25. This was evidenced by an audit confirmation sent by the plaintiff's auditors to the defendant. On the basis of

the plaintiff's failure to comply with cl 7 of the agreement, the defendant was entitled to terminate the agreement and that the three months' required notice to be given pursuant to cl 14, was inapplicable in respect of a breach of cl 7. Hence, the plaintiff had failed to prove that the defendant had been in breach of the agreement (see pp 653G–I, 654F).

- (4) The defendant had indeed filed an application for a stay of all further proceedings pending reference to arbitration. On 23 April 1987 the said application was dismissed with costs after the plaintiff had opposed the said application. The plaintiff was bound by issue estoppel and could not invoke this provision in the agreement. Although the said application was only an interlocutory application, the issue of arbitration had indeed been decided, albeit at an interlocutory stage, yet binding upon the parties. The plaintiff had given no explanation as to why it had to oppose the said application at the interlocutory stage if its intention was to go for arbitration. Surely the plaintiff cannot approbate and reprobate (see pp 654H–655A).
- (5) Since in the pleadings the plaintiff had only relied on the notice to the customers as founding a case in defamation, the plaintiff could not now rely on the advertisements to found a case in defamation as this was not pleaded. In any case, the advertisements were taken out after the plaintiff had filed the statement of claim (see p 655F–G).
- (6) As for the notice, there was nothing defamatory about the contents. Since the plaintiff knew that in respect of motor policies at least the regulation requiring cash before cover must be complied with and since the plaintiff itself knew that it had collected such premiums and had not forwarded the same to the defendant, the defendant was certainly within its rights to enquire from the customers proof of payment because the defendant was not expected to carry the burden of insurance without receiving the premiums. As for the non-motor policies, the plaintiff knew well that it had not complied with the 90 day rule to settle premiums. If the plaintiff felt humiliated or defamed the plaintiff was the author of its own misfortune. In any case, the words contained in the notice were not defamatory (see pp 655G–656A).
- (7) It is important that the court does not put a strain or an unlikely construction upon the words used. The plaintiff called no witness nor led any evidence to show that the words complained of were defamatory. Applying the accepted objective test which is what the man in the street would think, upon reading the notice dated 10 November 1986, the said notices were merely issued for the protection of the policy holders themselves that was to ensure that the insurance policies were still in force. There was therefore no question of any malice on the part of the defendant. The

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- A defendant was under a legal duty pursuant to s 14A of the Insurance Act 1963 and reg 3 of the Insurance (Assumption of Risk and Collection of Premium) Regulations 1980 and/or social duty to publish the said notices for the necessary protection of the general public and in particular the policy holders and also in the defendant's own interest (see pp 656D–F).
- B (8) The plaintiff claimed a sum of RM2.5m for loss of business goodwill. However, the plaintiff had failed to plead for this head of damage. On this ground alone this claim would not be considered. The plaintiff also led no evidence to prove this head of damage (see pp 658C).
- C (9) The plaintiff led no evidence to show what it had actually collected. The plaintiff has failed to discharge its burden of proof. It had not tendered any of its audited accounts. As for the projected income for the future, no evidence was led to show the prospects of achieving such projected income. In the light of the decision of the then Supreme Court in *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perakayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, the plaintiff's claim for future projected loss was too remote and untenable (see pp 658G–659A).
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[Bahasa Malaysia summary]

- E Defendan merupakan syarikat insurans tempatan dan plaintiff, pada semua masa material menjalankan perniagaan menaja jamin. Melalui suatu perjanjian agensi yang utama ('perjanjian tersebut') bertarikh 2 Januari 1981 di antara plaintiff dengan defendan, plaintiff telah dilantik sebagai agen utama defendan dan telah diberi kuasa untuk menerbitkan polisi-polisi termasuk polisi motor dan bukan motor. Melalui kl 7 perjanjian tersebut, plaintiff diberi 90 hari untuk menjelaskan segala wang yang perlu dibayar kepada defendan untuk polisi bukan motor dan tiada tempoh masa kredit untuk insurans motor. Melalui kl 14 perjanjian tersebut, parti-parti dikehendaki memberi notis sebanyak tiga bulan sekiranya mana-mana parti hendak membatalkan perjanjian. Klaus 21 perjanjian tersebut merupakan klausa penimbangtaraan. Plaintiff belum mengirimkan premium yang dikutip kepada defendan dan berdasarkan pendokumenan juruaudit plaintiff, sejak 18 Disember 1986, plaintiff berhutang kepada defendan sebanyak RM1,050,100.25 sebagai premium yang belum dibayar. Defendan telah menghantar notis-notis bertarikh 10 November 1986 kepada pelanggan-pelanggan plaintiff atau pemegang polisi atau subagen yang menyatakan bahawa perjanjian diantara plaintiff dengan defendan telahpun ditamatkan sejak 30 September 1986. Plaintiff telah memfailkan tuntutan terhadap defendan untuk pelanggaran klausa-klausa perjanjian.
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- I Defendan telah memfailkan permohonan pergantungan prosiding sementara menunggu rujukan kepada timbangtara ('permohonan tersebut'), tetapi permohonan tersebut telah ditolak dengan kos

setelah plaintif membuat bantahan terhadap permohonan tersebut. Isu-isu untuk ditentukan adalah: (i) sama ada notis penamatan perjanjian tiga bulan telah disampaikan kepada plaintif menurut kl 14 perjanjian tersebut; (ii) bila notis kl 14 perjanjian tersebut diperlukan; (iii) sama ada kl 7 telah dilanggar oleh plaintif; (iv) sama ada defendan perlu memberi notis penamatan perjanjian tiga bulan tersebut; (v) sama ada defendan telah melanggar kl 12 perjanjian tersebut, iaitu klausa timbangtara; (vi) sama ada defendan, dengan menghantar notis-notis penamatan perjanjian tersebut kepada pelanggan-pelanggan dan pemegang-pemegang polisi dan dengan memaparkan iklan sedemikian di dalam suratkhbar, telah memfitnahkan plaintif; dan (vii) sama ada plaintif boleh menuntut kehilangan nama baik perniagaannya memandangkan plaintif tidak memohon gantirugi tersebut; dan (viii) sama ada plaintif telah membuktikan kerugian tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

- (1) Tiada notis penamatan perjanjian yang dikatakan telah diberi, yang dikemukakan kepada mahkamah. Memandangkan demikian, mahkamah mestilah memutuskan bahawa tiada dokumen sebegitu telah dikemukakan. Ia menjadi persoalan fakta untuk mahkamah memutuskan sama ada notis penamatan perjanjian telah diberi oleh defendan dan mahkamah telah memutuskan bahawa notis sebegitu tidak diberikan (lihat ms 651I–652C).
- (2) Keperluan notis kl 14 menjadi penting hanya di dalam kes di mana parti hendak menamatkan perjanjian bagi tempoh masa yang tidak pasti. Mahkamah perlu menimbang perjanjian secara keseluruhan dan bukan secara klausa demi klausa untuk mengetahui kenapa notis tiga bulan tersebut diperuntukkan di dalam kl 14. Selain daripada apa yang diperuntukkan di dalam kl 14, tiada sebab yang diberi mengena dengan bila parti-parti boleh menamatkan perjanjian. Oleh itu, ia adalah logik bahawa keperluan notis penamatan tiga bulan adalah untuk membolehkan parti yang hendak menamatkan perjanjian mengawal akaun-akaun mereka dan perkara-perkara yang berkaitan. Klausa 14 tidak digunakan dalam perlanggaran kl 7 perjanjian tersebut oleh plaintiff. Klausa 14 sepatutnya dibaca sebagai mengandungi perkataan ‘except where there has been a breach of this agreement’ (lihat ms 652D–F, 653C); *Howe v Botwood* [1913] 2 KB 387 diikuti.
- (3) Sehingga ke 31 Mei 1986, plaintif berhutang kepada defendan wang berjumlah RM1,050,100.25. Ini dibuktikan oleh pengesahan audit yang dihantar oleh juruaudit plaintif. Berdasarkan kegagalan plaintif untuk mematuhi kl 7 perjanjian tersebut, defendan berhak menamatkan perjanjian tersebut dan notis penamatan tiga bulan tersebut tidak boleh dipakai dalam perlanggaran kl 7. Oleh itu, plaintiff gagal membuktikan bahawa defendan telah melanggar perjanjian tersebut (lihat ms 653G–I, 654F).

- A (4) Defendan sememangnya telah memfailkan satu permohonan untuk satu penggantungan terhadap kesemua prosiding lanjutan sementara menunggu rujukan kepada penimbangtara. Pada 23 April 1987 permohonan tersebut telah ditolak dengan kos setelah plaintif membantah permohonan tersebut. Plaintif terikat oleh persoalan estoppel dan tidak boleh menggunakan peruntukan ini di dalam perjanjian. Walaupun permohonan tersebut hanya satu permohonan interlokutori, persoalan timbangtara telahpun diputuskan, sungguhpun di peringkat interlokutori, tetapi mengikat ke atas pihak-pihak. Plaintif tidak memberikan apa-apa penjelasan terhadap kenapa ia hendak membantah permohonan tersebut di peringkat interlokutori jika hasratnya adalah untuk merujuk kepada timbangtara. Pastiina plaintif tidak boleh memperkenan atau mengutuk (lihat ms 654H-655A).
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- D (5) Memandangkan pliding-pliding plaintif hanya bergantung kepada notis pelanggan-pelanggan di dalam kes yang didapati mengandungi fitnah, plaintif tidak boleh sekarang bergantung kepada iklan-iklan untuk membuktikan kes berunsur fitnah kerana ini tidak dipohon. Dalam apa keadaan, iklan-iklan tersebut dikeluarkan setelah plaintif memfailkan pernyataan tuntutan plaintif (lihat ms 655F-G).
- E (6) Berhubungan notis tersebut, tiada apa yang berunsur fitnah tentang knadungannya. Memandangkan plaintif telah mengetahui berkaitan polisi-polisi motor tersebut sekurang-kurangnya peraturan yang menghendaki bayaran wang sebelum diberikan perlindungan mestilah dipenuhi dan memandangkan plaintif sendiri telah mengetahui bahawa ia telah mengutip premium sedemikian dan tidak mengemukakan yang sama kepada defendan, defendan sememangnya mempunyai hak untuk menanyakan daripada pelanggan-pelanggan bukti pembayaran kerana defendan tidak dikehendaki memikul beban insuran tanpa menerima premium. Berhubungan polisi-polisi tidak bermotor, plaintif memang mengetahui bahawa ia tidak mematuhi peraturan 90 hari untuk menyelesaikan premium tersebut. Sekiranya plaintif terasa dimalukan atau diaibkan plaintif adalah penyebab kerugiannya sendiri. Dalam apa keadaan, perkataan-perkataan yang terkandng di dalam notis tersebut tidak berunsur fitnah (lihat ms 655G-656A).
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- H (7) Ia adalah penting bahawa mahkamah tidak memberi erti yang tidak mungkin di atas perkataan-perkataan yang digunakan. Plaintif tidak memanggil saksi mahupun mengemukakan keterangan untuk menunjukkan bahawa perkataan-perkataan yang digunakan adalah fitnah. Menggunakan ujian objektif, iaitu apa yang difikirkan oleh orang awam, setelah membaca notis bertarikh 10 November 1986, notis tersebut hanya digunakan untuk perlindungan pemegang polisi untuk memastikan bahawa polisi insurans masih dikuatkuasakan. Tiada persoalan niat jahat oleh defendan. Defendan mempunyai kewajipan menurut
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undang-undang menurut s 14A Akta Insuran 1963 dan peraturan 3 Insurance (Assumption of Risk and Collection of Premium) Regulations 1980 dan/atau kewajipan sosial untuk menerbitkan notis-notis tersebut untuk perlindungan orang-orang awam dan khususnya pemegang polisi dan juga untuk kepentingan defendan sendiri (lihat ms 656D–F).

(8) Plaintiff menuntut RM2.5j untuk kehilangan nama baik perniagaannya. Walaubagaimanapun, plaintiff tidak memohon ganti rugi tersebut. Oleh kerana itu, permohonannya tidak akan dilayan. Plaintiff juga tidak mengemukakan apa-apa keterangan untuk membuktikan ganti rugi ini (lihat ms 658C).

(9) Plaintiff tidak mengemukakan keterangan untuk menunjukkan apa yang telah dikutip. Plaintiff gagal melaksanakan beban pembuktiannya. Plaintiff tidak mengemukakan akaun-akaun yang telah diauditkan. Berkenaan dengan pendapatan masa depan yang dirancang, plaintiff juga gagal mengemukakan keterangan untuk menunjukkan prospek untuk mendapatkan pendapatan yang dirancang. Menurut kes Mahkamah Agung *Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, tuntutan plaintiff adalah terlalu terpendil dan tidak dapat dipertahankan (lihat ms 658G–659A).

Notes

For cases on termination of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3885–3904.

For cases on terms of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3905–4048.

For cases on libel generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 263–352.

For cases on damages in defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 216–222.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (folld)

Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58 (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 1 MLJ 305 (refd)

Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 2 MLJ 65 (refd)

Howe v Botwood [1913] 2 KB 387 (folld)

Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529 (refd)

The Capital and Counties Bank Ltd v George Henty and Sons [1882] 7 AC 741 (refd)

A Legislation referred to

Insurance Act 1996 ss 4(1), 14(A)
Insurance (Assumption of Risk and Collection of Premium)
Regulations 1980 reg 3
Public Health Act 1875

- B** *Wong Kam Leong (CC Cheng and Angela Low with him) (Wong Kam Leong & Partners) for the plaintiff.*
Muralee Menon (Allen Miranda with him) (Jaffar & Menon) for the defendant.

Kamalanathan Ratnam J:

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Facts

- The defendant is a local insurer licensed under the Insurance Act 1996 ('the Act') to deal with general business which means all insurance business which is not life business (see s 4(1) of the Act). The plaintiff was at all material times in the business of insurance underwriting. By a principal agency agreement ('the agreement') dated 2 January 1981 between the plaintiff and the defendant, the plaintiff was appointed the defendant's principal agent, and in pursuance thereof the plaintiff was authorized to underwrite or transact insurance business or policies, and was authorized to issue policies of all kinds which included motor and non-motor policies. By virtue of the said agreement the plaintiff did transact and/or contract and/or underwrite insurance policies with various policy holders. It is relevant, for the purposes of deciding this case to set out the relevant provisions of the said agreement which read as follows:

7 SETTLEMENT OF ACCOUNTS

- F** Statement of Accounts shall be rendered on a monthly basis. The Company hereby agrees and covenants and the Principal Agent hereby agrees only for a period not exceeding NINETY (90) full days. All money due to the Company under any form of business transacted in the name or on behalf of the Company shall be due and paid up to the Company within the aforesaid NINETY (90) full days. No credit period is allowable for MOTOR INSURANCE except in compliance with provision made under the CASH BEFORE COVER REGULATION.'

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14 PERIOD OF AGREEMENT/TERMINATION

- The Agreement takes effect on and from 1 July 1980 and shall remain in force until cancelled by either the Principal Agent or the Company giving to the other THREE (3) months' notice of their intention to terminate this Agreement. In the event of this Agreement being terminated as herein provided all insurance commencing prior to the expiry date of the notice of cancellation shall continue to their NATURAL EXPIRY date and the Company shall be responsible and will meet all claims arising therefrom provided premiums for such insurance have been paid to the Company.'

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21 ARBITRATION

All disputes and differences which may arise between the contracting parties in respect of business ceded under this Agreement or the meaning

of its conditions are to be settled by an equitable rather than a strictly legal interpretation of the provisions of this Agreement. Failing agreement between the parties they shall submit it to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties, or in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings. The Arbitrators will not have to undergo any judicial formality and can abstain from following the strict rules of laws, but shall construe this Agreement as a mutual understanding binding in honour in accordance with fair insurance practice. The Arbitration proceeding shall take place in Malaysia. The Arbitrators shall fix their own procedures including the apportionment and payment of costs. The award of the Arbitrators shall be final and binding on both parties.

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The plaintiff's claim

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It is the plaintiff's case that in breach of cl 14, the defendant sent out notices dated 10 November 1986 to the plaintiff's customers or policy holders or sub-agents, stating that the said agreement with the plaintiff had been terminated as of 30 September 1986. It is also necessary to reproduce a sample of the said letter sent out by the defendant to one of the plaintiff's customers. The said notice reads as follows:

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Schedule

Progressive Insurance Sdn Bhd

10 Nov 1986

Chee Seng Mee
69, Lorong Bukit Cina
75100 Melaka AR register

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Dear Sir,

Re: Cancellation of Policy
Policy No : MMC1003574
Vehicle Regn No : ME 61
Premium : RM40.88

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We wish to inform you that the agency of Daniel KC Tan & Associates Sdn Bhd has been terminated effective 30 September 1986.

We therefore request that you kindly submit copies of all the official receipts evidencing premium payments made to Daniel KC Tan & Associates Sdn Bhd to us. As a result of the termination of the said agency we would kindly instruct you from now on to make all premium payments direct to us.

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Further please also forward to us copies of the receipts as above together with any outstanding premiums due within fourteen (14) days from the date hereof failing which we have no alternative but to exercise our rights in cancelling your policy.

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A Yours faithfully
Progressive Insurance Sdn Bhd

Sgd

B Mohd Zerain Majid
Regional Manager

cc: Daniel KC Tan & Associates Sdn Bhd

C The plaintiff contended that no such notice of termination was ever given or served on it. Claiming that it was inundated with calls and visits from its clients and customers upon receipt of the defendant's notice, the plaintiff contended that it had been defamed. It thus sued for damages for breach of contract, damages, including aggravated damages for defamation, and also sought an injunction and costs.

Case for the defence

D Whilst not expressly admitting to a specific date as to when the notice of termination was either dated or given, the defendant pleaded in its defence that it had 'prior to 30 September 1986, and in accordance with the said agreement, given all necessary and relevant notices to the plaintiff of the defendant's intended termination due to reasons best known to the plaintiff and of which the plaintiff has full knowledge'. The defendant contended that the termination of the agreement was brought about because the plaintiff had not remitted to the defendant the premiums collected and that based on the plaintiff's auditors' documentation itself, the plaintiff had, as of 18 December 1986 owed the defendant the sum of RM1,050,100.25 as unpaid premiums. The defendant also denied that its notice to the various policy holders was defamatory or that the said words in the notice bore or were understood to bear or were capable of bearing any of the meanings as set out by the plaintiff. The defendant contended that it sent out that notices in good faith and without malice and that it was fair comment on a matter of public interest, namely, to protect the interests of the policy holders who might not be covered although they might be under the misconception that they were being covered since they had paid the premiums. There was a counterclaim by the defendant, which it subsequently withdrew. Since the court was not notified by either party as to whether there was to be any order for costs, I shall refrain from making any order for costs in respect of the counterclaim.

The defendant thus asked for the suit to be dismissed with costs.

H *Findings of the court*

On contract

I The main grouse of the plaintiff was the defendant's breach of cl 14 of the said agreement in failing to give the required three months' notice of the defendant's intention to terminate the agreement. Admittedly there is no such notice that was alleged to have been given, that has been shown to the court. There is no such notice in the two volumes of the bundles of agreed

documents. Whilst the defendant had boldly pleaded that prior to 30 September 1986 and that in accordance with the said agreement, it had given 'all necessary and relevant notice to the plaintiff', unfortunately this is denied by the plaintiff and in the absence of any such document, the court must find that no such notice has been given. The court is at a loss to understand why an insurance company that is required by the stringent terms of the Act to regulate its operations properly, would put itself in such a precarious position as not to be able to produce its own office copy of the alleged notice. At least the defendant ought to have served the plaintiff with a notice to produce. Since the notice of termination is the linchpin of the case of the defendant, it was all the more incumbent upon the defendant to have preserved the said notice. I agree with the plaintiff's submission that it is a question of fact for this court to find if such a notice of termination had indeed been given by the defendant and it is my finding that no such notice was indeed given.

When is such a notice relevant?

The defendant argued that the requirement of the notice pursuant to cl 14 becomes important only in cases of either party not wanting to continue with the agreement indefinitely. I agree. It is necessary for this court to consider the agreement as a whole rather than clause by clause in order to appreciate the reason as to why the requirement of the three months' notice was stipulated in cl 14. The said agreement took effect from 1 July 1980 and no termination date for the said agreement had been provided for. Other than what is stated in cl 14, there are no other reasons given as to when parties could terminate the said agreement. Therefore, it only stands to logic that the need to give a three month notice by either party wanting to terminate the said agreement was to enable them to regulate their accounts and related matters. This clause therefore need not apply to an instance of a breach of cl 7 of the agreement by the plaintiff. I am fortified in holding this view by referring to the judgment of Channell J in *Howe v Botwood* [1913] 2 KB 387. In that case, a lease of a dwelling house contained a covenant by the lessee to 'pay and discharge all rates, taxes, assessments, charges, and out goings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof (land tax and landlord's property tax only excepted)'. The lessor covenanted to 'keep the exterior of the said dwelling house and buildings in repair.' The sanitary authority served notice during the term on the lessor under the Public Health Act 1875, stating that a nuisance existed on the premises arising from an outside defective drain and requiring him to do certain work which involved the renewal and reconstruction of the drainage system outside the house; and an order of justices was made directing him to do the work. The lessor accordingly did the work required, and claimed to recover from the lessee the cost thereof so far as it exceeded mere repair. The Court held that the lessee's covenant to pay 'all outgoings imposed on the landlord in respect of the premises' must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the buildings in repair, and that, as the work of renewal and

A reconstruction was necessary in order to enable the lessor to perform his covenant to repair, he was bound to bear the costs thereof. The learned judge said at p 391 as follows:

The expense of executing the work would under this covenant fall on the plaintiff. If therefore that covenant by the plaintiff had stood alone without the covenant by the defendant, that is how I should construe it. That covenant, however, has to be read with the earlier covenant by the tenant to pay and discharge all outgoings. There are thus two covenants, one placing the burden on the tenant and the other placing it on the landlord. We must construe the lease as a whole so as to make it consistent in both its parts. In my opinion the covenant by the tenant must be read as if it contained the words 'except such as are by this lease imposed upon the landlord.' By reading that exception into the covenant by the tenant the two covenants can be read together. If it were not so read in, the cost of ordinary repairs to the outside drains might come within the tenant's covenant.

It is therefore my view that cl 14 should be read as if it contained the words 'except where there has been a breach of cl 7 of this agreement'.

D Breach of cl 7

Needless to say, cl 7 is the most important clause as between the parties. It requires on an imperative tone that the plaintiff do pay to the defendant within 90 days all monies due to the defendant in the form of premiums collected by the plaintiff. However, in respect of motor policies, this clause stipulates that there be no credit period allowable, no doubt because of the requirement of cash before cover. Clause 8 allows for the plaintiff however to deduct its commission and send the balance to the defendant within the stipulated period of 90 days for non-motor policies.

F By a letter dated 22 March 1986, the defendant wrote to the plaintiff informing him that as of that date the plaintiff owed the defendant the sum of RM1,106,871 as outstanding premiums made up as follows:

Motor	RM 260,327.52
Non-motor	RM 846,543.48
	<u>RM1,106,871</u>

G As at 31 May 1986, the plaintiff owed the defendant a sum of RM1,050,100.25. This is evidenced by an audit confirmation sent by the plaintiff's auditors to the defendant.

H It is obvious therefore that the defendant was clearly alarmed at the large amount of premiums outstanding and especially when there was a sum due on the motor premium which on the basis of cash for cover, ought to have been forthwith remitted to the defendant. On the basis of the plaintiff's failure to comply with cl 7 of the agreement, it is my judgment that the defendant was entitled to terminate the said agreement and that the three months' required notice to be given pursuant to cl 14, was inapplicable in respect of a breach of cl 7. By a letter dated 13 September 1986, the plaintiff acknowledged that as of that date the current outstanding amount was RM983,959. There was no acknowledgement as to what proportion of the

said outstanding amount constituted motor, and what constituted non-motor premiums. In that letter, the plaintiff pleaded for time to pay because the economic slowdown had caused general cash flow problems and also pleaded for the opportunity to continue with the business. This letter of 13 September 1986 by the plaintiff to the defendant was in response to the defendant's letter to the plaintiff dated 3 September 1986 and which said letter unfortunately had not been included by the defendant in the agreed bundle of documents. However, the plaintiff referred to the contents of the said letter in its letter dated 13 September 1986 and pleaded with the defendant 'not to adopt the actions stipulated in your letter as it entails a long legal process but to allow us some time to sort out matters one at a time in a convenient manner'.

Needless to say the plaintiff was fully aware of the large sum it owed the defendant as premiums due. In response to the plaintiff's letter pleading for time, the defendant by its solicitors' letter dated 25 October 1986, demanded the outstanding premium of RM877,588.20. Unfortunately for the defendant the said notice referred to the agreement being terminated pursuant to cl 14 of the agreement with effect from 30 September 1986. It is my judgment that the failure to transmit the collected premium within the stipulated 90 days pursuant to cl 7 would in itself entitle the defendant to terminate the agreement forthwith. In fact, I would take the solicitors' letter dated 25 October 1986 as sufficient notice of termination as, notwithstanding the fact that the said letter had demanded the balance due, it had also demanded the return of 'all cover notes and stationeries and/or documents' in the plaintiff's custody, control or possession within seven days from the date of the said notice failing which the defendant threatened to 'advertise that those cover notes and documents as being null and void'.

The defendant had withdrawn the counterclaim in this suit and the same was struck out as on 3 July 1992. The said counterclaim is now the subject matter of another claim already filed in another court. Since it is my judgment that there was no need to give notice pursuant to cl 14 for a breach of cl 7 in so far as this case is concerned and on the evidence so far adduced, it is my judgment that the plaintiff has failed to prove that the defendant had been in breach of the contract.

Arbitration

The plaintiff also pleaded that the defendant was in breach of cl 21 which provided for arbitration in the event of any dispute between the parties and that the defendant had failed to resort to arbitration before terminating the agreement. A perusal of the file showed that the defendant had indeed filed an application for a stay of all further proceedings pending reference to arbitration. On 23 April 1987, the said application was dismissed with costs after the plaintiff had opposed the said application. The plaintiff is bound by the issue of estoppel and cannot invoke this provision in the agreement. The plaintiff's contention that it can re-agitate this issue at the full hearing since the earlier application was only an interlocutory application, is flawed as the issue of arbitration has indeed been decided, albeit at an interlocutory

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A stage, yet binding upon the parties. The plaintiff has given no explanation as to why it had to oppose the said application at the interlocutory stage if its intention was to go for arbitration. Surely the plaintiff cannot approbate and reprobate.

B Defamation

C It is the plaintiff's case that by sending out the notice of termination of the plaintiff's agency to all customers and policy holders, and by placing such similar advertisement in *The Star*, *Nanyang Siang Pau* and *Utusan Malaysia*, the defendant had defamed the plaintiff. The plaintiff contended that the notice dated 10 November 1986, when read in its totality and by the natural and ordinary meaning of the words contained therein or by innuendo, had defamed the plaintiff by implying that the plaintiff was in breach of the agreement, that the plaintiff was dishonest or had acted illegally by not observing regulations, for example, the cash before cover regulating motor policies, and that the plaintiff had not remitted premiums to the defendant after collecting them from the customers. The plaintiff also contended that the said notice and advertisement in the newspapers had the effect of exposing the plaintiff and its principal officers to hatred, ridicule and contempt in the mind of a reasonable man or that such words tend to lower the plaintiff and its principal officers in the esteem of right thinking members of the public generally, and the customers, and the insurance industry. The plaintiff argued that the dispute between the plaintiff and the defendant as to the accounts between them is quite irrelevant to the position of the customers and the insurance policies issued to them. The plaintiff pointed out that since the motor policies issued by the plaintiff as principal agent for the defendant is governed by the cash before cover regulations, the defendant ought to have known that the insinuation in the notice to the customers that the premiums had not been paid, was defamatory and malicious.

G I accept the defendant's submission that since in the pleadings the plaintiff had only relied on the notice to the customers as founding a case in defamation, the plaintiff cannot now rely on the advertisements to found a case in defamation as this was not pleaded. In any case, the advertisements were taken out after the plaintiff had filed the statement of claim. The advertisements were taken out on 1 October 1987 whilst the statement of claim was filed on 9 December 1986.

H As for the notice, I find nothing defamatory about the contents. Since the plaintiff knew that, in respect of motor policies at least, the regulation requiring cash before cover must be complied with and since the plaintiff itself knew that it had collected such premiums and had not forwarded the same to the defendant, it is my judgment that the defendant was certainly within its rights to enquire from the customers proof of payment because the defendant is not expected to carry the burden of insurance without receiving the premiums. As for the non-motor policies, the plaintiff knew well that it had not complied with the 90 day rule to settle premiums. If the plaintiff felt humiliated or defamed, the plaintiff was the author of its own

misfortune. In any case, as I said, the words contained in the notice are not defamatory. In *The Capital and Counties Bank Ltd v George Henty and Sons* [1882] 7 AC 741, H & Sons were in the habit of receiving, in payment from their customers, cheques on various branches of a bank, which the bank cashed for the convenience of H & Sons at a particular branch. Having had a squabble with the manager of that branch, H & Sons sent a printed circular to a large number of their customers (who knew nothing of the squabble) — 'H & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the bank'. The circular became known to other persons; there was a run on the bank and loss inflicted. The bank brought an action against H & Sons for libel, with an innuendo that the circular imputed insolvency. In affirming the decision of the Court of Appeal, the House of Lords held that in their natural meaning, the words were not libellous. The inference suggested by the innuendo was not the inference which reasonable persons would draw and that the onus lay on the bank to show that the circular had a libellous tendency. The Court held that the evidence, consisting of the circumstances attending the publication, failed to show it and that there was no case to go to the jury, and that the defendants were entitled to judgment.

It is important that the court does not put a strain or an unlikely construction upon the words used. The plaintiff called no witnesses nor led any evidence to show that the words complained of are defamatory. Applying the accepted objective test which is what the man in the street would think, upon reading the notice dated 10 November 1986, I find that the said notices were merely issued for the protection of the policy holders themselves that is to ensure that the insurance policies were still in force. There is therefore no question of any malice on the part of the defendant.

The defendant was under a legal and/or social duty to publish the said notices for the necessary protection of the general public and in particular the policy holders and also in the defendant's own interest. The defendant is a licensed insurance company. It is my judgment that the defendant was entitled by law to send out such notices.

Section 14A of the Insurance Act 1963 reads as follows:

14A Assumption of risk by insurer and collection and refund of premium.

- (1) Subject to subsections (2) and (3), no insurer shall assume any risk in respect of any general insurance business unless and until —
 - (a) the premium payable is received by the insurer or is guaranteed to be paid by such person in such manner and within such time as may be prescribed; or
 - (b) deposit of such amount as may be prescribed is made in advance in the manner prescribed.
- (2) Where the premium payable pursuant to subsection (1) is received by any person, including an insurance agent or a broker, on behalf of an insurer, such receipt shall be deemed to be receipt by the insurer for the purposes of that subsection and the onus of proving that the premium payable was received by a person, including an insurance

- A agent or a broker, who was not authorised to receive such premium shall lie on the insurer.
- (3) Subsections (1) and (2) shall apply to such description of general insurance business as may from time to time be prescribed.
- (4) Where any person, including an insurance agent or a broker, receives on behalf of an insurer a premium on a policy of insurance of a description for the time being prescribed pursuant to subsection (3), such person shall deposit with, or despatch by post to, the insurer the premium so collected within such period as may be prescribed in relation to policies of that description.
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- (5) Any refund of premium, in relation to a policy of insurance of a description as may be prescribed under subsection (3), which may become due to an insured on account of the cancellation of the policy or alteration in its terms and conditions or for any other reason shall be paid by the insurer directly to the insured and a proper receipt shall be obtained by the insurer from the insured and such refund shall under no circumstances be paid or credited to any other person, including an insurance agent or a broker.
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- D (6) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit.

Regulation 3 of the Insurance (Assumption of Risk and Collection of Premium) Regulations 1980 reads as follows:

- E No insurer shall assume any risk in respect of any general insurance business to which these Regulations apply unless and until the premium payable is received by the insurer.

In *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529, the defendant, a feature writer for *The New Straits Times*, wrote an article entitled '*Ostrich farms should provide prospectus*'. The plaintiff had advertised its ostrich farming business in the newspapers inviting investment in ostrich farming. The plaintiff claimed that the words contained in certain paragraphs of the defendant's article in their natural meaning were understood to mean that the public or potential investors must act with caution in respect of the plaintiff's dubious advertisement. The plaintiff sued for damages for libel as well as for malicious falsehood. Dismissing the claim, I held that the article was a fair comment by the defendant on a matter of public interest to safeguard the general public from rushing into such investments without sufficient details.

In *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58, the plaintiff, the former Deputy Prime Minister of Malaysia, sued the present Prime Minister in defamation. The plaintiff who had been either dismissed or removed from his various governmental and political positions claimed that on 22 August 1998, the defendant falsely and maliciously spoke and published to national and international journalists of and concerning the plaintiff as well as accusing the plaintiff of homosexuality. The defendant filed an application to strike out the writ. Allowing the application to strike out and amongst other grounds, I held that as the Chief Executive of the Government, the defendant was under a

legal, moral and social duty to inform the nation of the matters concerning the plaintiff, more so when the information that was given to the defendant as disclosed in the press conference was true in substance and in fact. The said judgment was upheld by the Court of Appeal on this ground too (see *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [2001] 1 MLJ 305 . The Federal Court in *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65, upheld the same. In the circumstances, I find that the defendant herein had a legal, moral and social duty to send out the notices to all its policy holders.

Claim for loss of business goodwill

The plaintiff claimed a sum of RM2.5m under this head. However, the plaintiff had failed to plead for this head of damage. On this ground alone this claim will not be considered. The plaintiff also led no evidence to prove this head of damage.

In any case, the plaintiff submitted that 'a lot of people would want to purchase a company with an annual production of RM5,836,135 and also with growing production'. If the annual production was as stated, there is no reason why the plaintiff owed the defendant a sum of RM1,106,871 as of 22 March 1986. Whilst notionally the plaintiff has been chalking up the sales of policies, it had been unable to collect the premiums. It is therefore a matter of relevance as to whether the plaintiff indeed has any goodwill because long before the defendant had terminated the plaintiff, the plaintiff was indebted to the defendant in the sum of RM1,050,100.25. I doubt if anyone would want to purchase, paying RM2.5m as goodwill, a debt ridden company.

Proof of damages

The basis for the plaintiff's claim for RM697,500 as commission is a letter written by the plaintiff to the defendant on 13 September 1986. This letter cannot constitute the basis to found the claim. Whilst the plaintiff has admitted owing the defendant a sum of RM983,959 in that said letter, the defendant had not accepted the plaintiff's total production figures for the years 1981 to 1985. As I had said earlier, the plaintiff had chalked up sales with scant regard for collection. It is only when the plaintiff collects that he gets his commission. The plaintiff led no evidence to show what it had actually collected. On the other hand, it had in fact admitted owing the defendant the sum of RM983,959 as at 13 September 1986. The plaintiff has failed to discharge its burden of proof. It had not tendered any of its audited accounts. As for the projected income for the future, no evidence was led to show the prospects of achieving such projected income. On the contrary, the plaintiff's auditors confirmed that as at 31 May 1986 there was a sum of RM1,050,100.25 due and owing to the defendant by the plaintiff. DW1, the defendant's accountant, testified that as at 30 September 1989, the plaintiff owed the defendant a sum of RM635,086.68 in respect of the non-motor account. The plaintiff did not cross-examine DW1 on this. In the light of the decision of the then Supreme Court in *Bank Bumiputra*

- A** *Malaysia Bhd Kuala Trengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, I hold that the plaintiff's claim for future projected loss is too remote and untenable.

Having considered all the issues, I am therefore constrained to dismiss the plaintiff's claim with costs.

- B** *Plaintiff's claim dismissed with costs.*

Reported by Moy Saw Han

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